# 35 Years of CISG – Present Experiences and Future Challenges

## National Report: Germany

**Reporter: Ulrich G. Schroeter*[1]**

## 1. CISG and the Contracting Parties – exclusion and inclusion

### *1.1. Empirical basis*

The present section describes the role of the CISG during the process of drafting and entering into contracts and the CISG's use by contracting parties as well as law firms providing legal advice on international contracts of sale. It draws on three empirical surveys about the CISG's practical use that were conducted in Germany in recent years:[2]

In 2004, Justus Meyer (then at the Technical University Dresden in Germany) conducted a survey among German attorneys specializing in international sales matters and received 479 usable replies.[3]

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1 The present report provides an overview of the past experiences in the Federal Republic of Germany with the United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980 (CISG). It follows in the footsteps of earlier country reports on the German experiences with the CISG:
Sörren Kiene, 'German Country Analysis: Part II' in Larry A DiMatteo (Ed.), International Sales Law: A Global Challenge (2014) 377–398; Stefan Kröll, 'German Country Analysis: Good Faith, Formation, and Conformity of Goods' in Larry A DiMatteo (Ed.), International Sales Law: A Global Challenge (2014) 361–376; Ulrich Magnus, 'Germany' in Franco Ferrari (Ed.), The CISG and Its Impact on National Legal Systems (2008) 143–162., but takes its structure from the questionnaire designed by the organizers of the Zagreb Conference 2015.

2 See also Ulrich G Schroeter, 'Empirical Evidence of Courts' and Counsels' Approach to the CISG (with Some Remarks on Professional Liability), in Larry A DiMatteo ed., International Sales Law: A Global Challenge (2014) 649, 650.

3 Justus Meyer, 'UN-Kaufrecht in der deutschen Anwaltspraxis', 69 Rabel Journal of Comparative and International Private Law (2005) 457, 468.

In 2004–05, Martin Koehler targeted practicing attorneys in Germany with a survey about their experiences with the CISG.[4] The empirical relevance of his results is somewhat affected by the very small number of usable responses received (33 responses from German lawyers).

In late 2009, Ingeborg Schwenzer and her "Global Sales Law" research team at the University of Basel conducted the most comprehensive survey yet, both as far as the number of usable responses (640) and the countries covered (replies from 66 different countries) are concerned.[5] Among these replies, 32 were from German respondents.[6] In addition, the Global Sales Law survey did not only focus on businesses engaged in trade and on practicing lawyers, but included two other target groups, namely arbitrators and law schools. For the purposes of the present report which investigates contracting parties and lawyers only from Germany, the Global Sales Law survey accordingly is subject to the same caveat as the Koehler survey mentioned above.

### *1.2. Use or exclusion of the CISG in contract drafting, position of parties and their attorneys*

It is difficult to say whether the CISG usually is 'an integral part of the international contracts of sale entered into by the parties' from Germany – as the CISG applies by law whenever the prerequisites of Articles 1–5 CISG are fulfilled, it strictly speaking does not need to be part of any contract in order to apply. Insofar, the CISG applies as a default rule without being especially intended by the parties. Anecdotal evidence from German practice suggests that this is true for the majority of cases.

When the applicable law is specified by the parties in their contract, a direct reference to the CISG occasionally occurs, but such cases are relatively rare in practice.[7] Much more often, the contract contains a choice of law clause in favour of the law of a CISG Contracting State, which then results in the CISG's application or – maybe more frequently – merely confirms it.[8]

As far as the exclusion of the CISG's application in accordance with Article 6 CISG is concerned, it is necessary to strictly distinguish between the use of exclusion clauses in standard terms and the actual exclusion. The reason is that in order

4 Martin F Koehler & Guo Yujun, 'The Acceptance of the Unified Sales Law (CISG) in Different Legal Systems', 20 Pace International Law Review (2008) 45, 47.

5 Ingeborg Schwenzer & Christopher Kee, 'Global Sales Law – Theory and Practice', in Ingeborg Schwenzer & Lisa Spagnolo Eds., Towards Uniformity: The 2nd Annual MAA Schlechtriem CISG Conference (2011) 155, 156; see also Ingeborg Schwenzer, Christopher Kee & Pascal Hachem, Global Sales and Contract Law, 2012, para 5.05 et seq.

6 Schwenzer, Kee & Hachem, supra note 5, para 5.08 note 23.

7 See in more detail infra at 4.3. b).

8 See in more detail infra at 4.3. a).

to result in such an exclusion, an exclusion clause (or the standard terms it forms part of) has to be accepted by the opposing contracting in accordance with Article 18 CISG. This, however, is rarely the case, as the exclusion of the CISG is usually combined with a choice of law clause in favour of the home law of the party proposing the standard terms, which will rarely be acceptable to the other party. As a result, the presence of exclusion clauses in standard terms or contract drafts says very little about the degree to which the CISG's application is actually excluded in practice[9] – a distinction that is frequently overlooked.

Turning to the empirical evidence about German stakeholders' positions toward the CISG, it is helpful to distinguish between the position of contracting parties on one hand (infra at a)) and the position of advising attorneys on the other (infra at b)).

**a) Position of contracting parties**

The position of German businesses toward the CISG, including the question whether they want the application of the CISG when choosing the law applicable to their contracts, is difficult to gauge. The reason is the lack of specific empirical data about the position of German companies engaged in international trade, as only one of the CISG survey mentioned above – namely the Global Sales Law survey of 2009 – also targeted businesses and not only their legal advisers (attorneys). The responses to this survey, which unfortunately does not give separate results for respondents from Germany, indicated that 45% of the overall businesses, but 63% of the businesses located in CISG Contracting States were familiar or somewhat familiar with the CISG.[10]

In order to identify the businesses position with respect to the exclusion of the CISG in accordance with Article 6 CISG, indirect empirical evidence can be found in the responses of attorneys advising businesses in these matters. Insofar, 41.3% of the German lawyers confirmed that they had in the past excluded the CISG during contract drafting upon their clients' request,[11] although this number does not indicate how frequently such requests occurred.

Another, maybe more important source for evidence of the merchant community's approach towards the CISG are standard contract terms published by general business associations like the German Chamber of Industry and Commerce (DIHK). While the standard terms of business used by individual companies are usually drafted by their legal advisers and thus reflect the latter's' approach towards the applicable law,[12] general business associations have a broader focus and act to re-

9 Schroeter, supra note 2, at 662.

10 Schwenzer & Kee, supra note 5, at 159.

11 Meyer, supra note 3, at 476.

12 See infra at 1.2. b).

present all sectors of international business, industry and trade.[13] This justifies the assumption that choices made in their standard contracts and comparable documents are generally reflective of the business community's interest and unaffected by (possibly divergent) interests of the drafter himself.[14] It is therefore noteworthy that the DIHK Model Sales Contract (published in 2003)[15] does not exclude the application of the CISG, but was rather developed with the CISG's rules in mind.

### b) Position of attorneys

More empirical evidence is available about the position of attorneys toward the CISG.

The advantage of the CISG being a "neutral law" was reported by 33.8% among the German lawyers.[16] Among the German attorneys who did not advocate a contractual exclusion of the CISG, it furthermore was frequently argued that the CISG is easier to apply than a combination of conflict of laws rules and the provisions of a foreign sales law. This advantage was mentioned by 35% of the German attorneys in general, but even 69.2% of the highly specialized attorneys[17] (who may have had more practical experience in the matter).

A point addressed by almost every CISG survey is the degree to which counsel are usually, principally or preponderantly excluding the CISG's applicability in contracts or standard terms drafted for their clients. The 'opting-out quota' reported vary significantly between different jurisdictions, as well as between different surveys covering the same jurisdiction.[18] With respect to German lawyers, past surveys found that 42.17% (in 2004)[19] and 72.7% (in 2004–05, but based on merely 33 responses)[20] sometimes or often excluded the CISG during the drafting process. This result stands in interesting contradiction to the Global Sales Law survey from 2009, which provides the most recent international numbers that are also the most CISG-friendly: 13% of lawyers always and 32% sometimes exclude the CISG, but the majority (55%) rarely or never does.[21] The latter numbers, however, include responses from Germany, but also from a variety of other jurisdictions.

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13 Cf. Article 1(1) Satzung des Deutschen Industrie- und Handelskammertages (November 2011).

14 Cf. Klaus-Peter Berger, The Creeping Codification of the Lex Mercatoria (1999) 108–110.

15 Deutscher Industrie- und Handelskammertag, Schuldrechtsreform – Auswirkungen für den Außenhandel (2003) 24; cf. Rolf Herber, 'Editorial', Internationales Handelsrecht (2002) 1.

16 Meyer, supra note 3, at 480.

17 Meyer, supra note 3, at 479.

18 See Schroeter, supra note 2, at 661.

19 Meyer, supra note 3, at 471.

20 Koehler & Guo, supra note 4, at 48.

21 Schwenzer & Kee, supra note 5, at 160.

That the CISG "is generally not widely known" was mentioned as a reason for its contractual exclusion in 2004–7 by 51.5% of the German practitioners responding.[22] In contrast, unfamiliarity was a point only rarely cited in the larger Global Sales Law survey from 2009.[23] An alleged uncertainty in the CISG's application (due to vague legal terms and a lack of uniform interpretation) was given as a reason by 43.2% of the German practitioners.[24] In a different survey, the lack of sufficient CISG case law – a very similar point – was raised by much fewer attorneys (namely a mere 6.1% from Germany).[25]

In summary, much is to be said for the assumption that an important reason behind the tendency among lawyers to propose an exclusion of the CISG in their clients' contracts is the lack of familiarity on the side of the lawyers themselves.[26] Insofar, their advice to exclude is neither driven by a perceived inferiority of the CISG to national sale laws nor by a worry caused by the CISG's lack of comprehensive rules for all contractual problems which may arise, but rather by reasons of self-interest, because attorneys find it easier to advise on their domestic home law.

## 2. CISG and the courts

The CISG entered into force in the Federal Republic of Germany on 1 January 1991. Previously, it had already been in force in the then German Democratic Republic (East Germany) from 1 March 1990, having been ratified by this State shortly before the German reunification took place on 3 October 1990.

### *2.1. Number of court decisions applying the CISG*

It is difficult to tell exactly how many decisions have been rendered by German courts that have applied the CISG.[27] The reason is that there is no system in place in German that comprehensively covers the number of court decisions and also takes note of the substantive law that was applied by a court (as e.g. the CISG). Accordingly, the only numbers that are available relate to the number of published court decisions, which – due to the somewhat erratic way in which the publication of decisions occurs in practice (see infra at 3.) – is no more than a probably small percentage of the decisions that have actually been rendered and sent to the parties involved.

22 Koehler & Guo, supra note 4, at 50.

23 Schwenzer & Kee, supra note 5, at 160.

24 Meyer, supra note 3, at 474.

25 Koehler & Guo, supra note 4, at 50.

26 Schroeter, supra note 2, at 663.

27 Unless otherwise noted, all cases cited in the footnotes of the present report are available at the Albert H. Kritzer Database of Pace University School of Law (www.cisg.law.pace.edu) and/or at the CISG-online Database hosted by the University of Basel (www.cisg-online.ch), often with an English translation.

When focusing on the published German court decisions on the CISG, the Pace CISG database listed 532 decisions on 22 October 2015, making Germany the CISG Contracting State that has published more decisions than any other Contracting State (the Peoples' Republic of China ranking second with 432 decisions). These 532 published court decisions were decided over a period of close to 24 years since the CISG entered into force in Germany in 1991.

In order to get an impression of the relation between the above number of published CISG decisions and the overall case load of German courts, a possible point of reference are the general statistics on court cases published annually by the German Federal Statistical Office. As already mentioned earlier, these statistics unfortunately do not contain a number for the CISG cases decided. As to the overall number of civil law cases in German courts, the statistics for the year 2013 specify that 294,903 cases were pending before the Landgerichte (courts of first instance for civil matters with a value of more than 5,000 Euros) at the end of 2013.[28] At the same time, 4,143 civil cases were pending before the Bundesgerichtshof (BGH), the German Federal Supreme Court.[29] These numbers indicate that roughly 1.5% of the cases on the civil docket of the courts of first instance are appealed to the second instance (the Oberlandesgerichte) and then appealed once more to the BGH. Given that the BGH decided two CISG cases in 2013 and that this number in essence has been the average number of CISG decisions rendered annually by the BGH over the past years,[30] an application of Landgericht/BGH case ratio calculated above leads to the (admittedly far from exact) conclusion that roughly 133 CISG cases must have been pending before the German courts of first instance in 2013. As the number of such cases should have been at least the same in most other years, and sometimes probably higher (for example, the year 2014 saw four published BGH decisions on the CISG), it is clear that only a fraction of the CISG decisions rendered by German courts are actually published. The overall number of CISG decisions rendered in Germany between 1991 and 2015 must therefore be much higher than 532.

An equally rough-and-ready confirmation of the calculation presented above can be found in another part of the 2013 court statistics on civil matters. The statistics mention that 24,523 cases on sales („Kaufsachen") were concluded before the Landgerichte in that year.[31] This number does not distinguish between domestic and international sales, but combines both. If we assume that 133 CISG cases were concluded in 2013, this would amount to 0.5% of the overall cases on sales – a number that appears to be at the lower end of the expected range in a jurisdiction where many businesses have a strong focus on international trade. (Of course, many CISG

28 Statistisches Bundesamt, Rechtspflege – Zivilgerichte, 2013, p. 37.

29 Statistisches Bundesamt, supra note 28, p. 96.

30 See in more detail the numbers infra at 2.2.

31 Statistisches Bundesamt, supra note 28, p. 42.

cases will be resolved by arbitration, which may account for the relatively low number of CISG cases in German courts.)

### 2.2. *Increase or decrease in the number of decisions over time*

As with regard to the overall number of CISG cases rendered, it is similarly impossible to find reliable numbers about the increase or decrease in the number of decisions. When instead relying on the number of published CISG decisions, the only numbers readily available are those of the CISG decisions rendered by the BGH:

| **Year** | **1991** | **1992** | **1993** | **1994** | **1995** | **1996** | **1997** | **1998** | **1999** | **2000** |
|---|---|---|---|---|---|---|---|---|---|---|
| Cases | 0 | 1 | 0 | 0 | 2 | 4 | 4 | 2 | 2 | 0 |

| **Year** | **2001** | **2002** | **2003** | **2004** | **2005** | **2006** | **2007** | **2008** | **2009** | **2010** |
|---|---|---|---|---|---|---|---|---|---|---|
| Cases | 2 | 2 | 1 | 3 | 1 | 1 | 2 | 1 | 0 | 2 |

| **Year** | **2011** | **2012** | **2013** | **2014** | **2015**[32] |
|---|---|---|---|---|---|
| Cases | 0 | 2 | 2 | 4 | 3 |

The above numbers arguably neither show a clear increase nor a clear decrease in CISG decisions over time. Rather, the annual number of BGH decisions always lay between 0 and 4, with a rough average of 2 CISG decisions per year.

According to anecdotal evidence, the situation is somewhat different as far as courts below the BGH are concerned. Court decisions on the CISG rendered by courts of first instance were frequently published during the first years after the CISG had entered into force, but increasingly less so in recent years. However, this should not be mistaken as a sign that fewer CISG cases were decided by the Landgerichte – the steady number of BGH decisions make clear that this is not so. Rather, the question whether decisions by lower courts get published in Germany partially depends on the "novelty factor", with more decisions by lower courts being reported and published as long as the CISG was still new and unknown, and the publication rate subsequently decreasing once the CISG had been in force in the country for some years.

### 2.3. *Availability and collection of court decisions*

Germany does not have a case publication system that would make all decisions rendered by the courts comprehensively available to the public. The extent to which court decisions on the CISG (and on other matters) are made available to the public therefore primarily depends on the deciding court's rank within the German court hierarchy:

[32] January–October 2015.

- Decisions by the BGH have been made comprehensively available on the internet free of charge since 2000.[33] In earlier years, only selected decisions were published in printed form or in databases that require a subscription, although some of the earlier cases are also contained in the free internet database.

- Decisions by courts of appeals (Oberlandesgerichte) or courts of first instance (Landgerichte) are generally only published upon the initiative of the court or individual judges, occasionally also of parties or party representatives. Accordingly, the extent to which such decisions are available to the public varies significantly. The majority of decisions remain unpublished.

There is no collection of court decisions on the CISG that is focusing only on German decisions. However, the CISG-online database[34] covers most German CISG cases with the original text of the decisions. Many German decisions on the CISG are also translated into English and available in international databases as the Pace CISG Database or UNCITRAL's CLOUT collection.

### *2.4. Case law on the exclusion of the CISG's application (Article 6 CISG)*

There are a number of court decisions that have addressed the question whether the CISG's application had been excluded by the parties to a particular contract. Over time, the number of such decisions has decreased, i.e. the matter was much more frequently addressed in early German decisions on the CISG than it has been addressed in the last few years.

In determining the requirements for an exclusion of the CISG's application by the parties, German courts have generally adopted a strict interpretation.[35] One court has held that it is necessary that the exclusion of the CISG accord with the actual intention of the parties, and not only their hypothetical intention.[36]

In a contract conclusion scenario that took part between a Singapore seller and a German buyer in 2002, the buyer used standard terms which called for an application of "German law excluding the provisions of ULF and ULIS". The court held that this clause could not be interpreted as also excluding the CISG (which had replaced ULF/ULIS in Germany since 1991 according to Article 99 CISG), as the wording of the clause failed to make this intention sufficiently clear.[37]

In particular, the fact that parties have in their legal memoranda merely referred to provisions of domestic (German) law does not in itself result in an implied waiv-

33 Http://www.bundesgerichtshof.de/.

34 Http://www.cisg-online.ch/.

35 Schroeter, supra note 2, at 653–655.

36 Kammergericht, 24 January 1994, Docket No. 2 U 7418/92, CISG-online No. 130.

37 Oberlandesgericht München, 19 October 2006, Docket No. 23 U 2421/05, CISG-online No. 1394, Internationales Handelsrecht (2007) 30.

er of the CISG under Article 6 CISG.[38] The majority of German courts regard any implicit CISG exclusion through counsels' mutual reliance on domestic law with great scepticism, demanding a clear indication that the parties knew that they were changing the law applicable to their dispute.[39] One court of appeals even held that litigation exclusively based on the provisions of the German Civil Code constituted a positive choice of German law under the German conflict of laws rules, but that accordingly the CISG – as part of German law so chosen – was to be applied.[40]

In one case in which the parties' attorneys had clearly agreed upon "the application of German law to the current dispute" during the proceedings before the trial court and had subsequently presented their legal arguments with sole reference to provisions of the BGB, the Federal Supreme Court nevertheless remanded the case to the court of appeal and requested a clarification of the parties' intention to exclude the CISG.[41] This decision demonstrates the strict approach described above, as there had apparently been complete agreement between both party representatives and the trial court that the ad hoc choice of „German law" during the proceedings was to be understood as a choice of domestic non-unified German law, i.e. the BGB. However, the BGH demanded an application of the same strict standards developed for the interpretation of written exclusion clauses also to oral agreements about the exclusion (Article 6 CISG).

(Note that the exclusion of the CISG in connection with choice of law clauses will be dealt with supra at IV 3 a)).

### *2.5. CISG provisions most commonly applied; provisions causing persistent problems*

Given the significant number of CISG cases decided by German courts, it is difficult to say which articles of the CISG have been most commonly applied and most commonly discussed by the courts. In the reporter's opinion, much is to be said for the assumption that Article 39(1) ranks as the CISG provision most frequently applied.

There are no specific articles of the CISG that have caused persistent problems for the courts.

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38 Landgericht Bamberg, 23 October 2006, Docket No. 2 O 51/02, CISG-online No. 1400, Internationales Handelsrecht (2007) 113.

39 Oberlandesgericht Zweibrücken, 2 February 2004, CISG-online No. 877; Oberlandesgericht Rostock, 10 October 2001, CISG-online No. 671; Oberlandesgericht Dresden, 27 December 1999, CISG-online No. 511; Landgericht Bamberg, 23 October 2006, Docket No. 2 O 51/02, CISG-online No. 1400.

40 Oberlandesgericht Hamm, 9 June 1995, Recht der Internationalen Wirtschaft (1996) 689.

41 Bundesgerichtshof, 11 May 2010, Docket No. VIII ZR 212/07, CISG-online No. 2125 para 15.

## 3. CISG and the legislation, education and legal scholarship

### *3.1. The CISG and German domestic sales law*

#### a) General similarity between the CISG and German domestic sales law, influence of the CISG

Up to 31 December 2001, the German law of sales was marked by significant differences to the CISG, with the then §§ 433 et seq. BGB having been in force (and virtually unchanged) since 1 January 1900 and having largely been built on the model of Roman law. This changed on 1 January 2002 when the German general rules on contract law as well as the law of sales was significantly overhauled through the Schuldrechtsmodernisierungsgesetz (Law modernising the law of obligations), which inter alia served to implement the 1999 EC Directive on Consumer Sales. By way of the adoption of the Schuldrechtsmodernisierungsgesetz, German law was significantly influenced by the CISG, both indirectly and directly:

- As the EC Directive on Consumer Sales had itself been strongly influenced by the CISG,[42] its implementation into German law resulted in an indirect influence of the CISG on German law. This influence extended beyond the area of consumer law also to the "general" law of contracts and the sales law applicable to transactions between professionals, traders or commercial parties, as the German legislator had decided to implement the requirements of the Directive beyond its actual scope.

- In addition, German law was directly influenced by the CISG in a number of matters not governed by the EC Directive on Consumer Sales. In this respect, the legislative materials on the Schuldrechtsmodernisierungsgesetz of 2001 explicitly refer to the CISG as a "model".[43] Against this background, there is agreement among academic authors that the CISG has to a significant extent influenced the reform of the German law of obligations.[44]

As a result of this influence, the content of many individual provisions in the BGB displays similarities with the CISG. However, the similarity does not extend to the structure of the law as a whole, as the CISG provisions have often served as a model for provisions in the BGB's general rules of the law of obligations.

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[42] Ulrich G Schroeter, UN-Kaufrecht und Europäisches Gemeinschaftsrecht – Verhältnis und Wechselwirkungen (2005) § 4 para 23; Dirk Staudenmayer, 'Die EG-Richtlinie über den Verbrauchsgüterkauf', Neue Juristische Wochenschrift (1999), 2393–2394.

[43] Deutscher Bundestag, 14. Wahlperiode, Bundestags-Drucksache 14/6040, pp. 86 and 89.

[44] See Carsten Herresthal, 'Die Schuldrechtsmoderniserung 2002. Modell für die europäische Privatrechtsvereinheitlichung?' in Markus Artz, Beate Gsell and Stephan Lorenz (Eds.), Zehn Jahre Schuldrechtsmodernisierung (2014) 279 at 317.

### b) Main differences between the CISG and German domestic sales law

Despite the CISG's influenced on the BGB's law of obligations described above, there remain a number of differences between the two sets of rules. The probably most important one, both theoretically and practically, is that the debtor's liability under the BGB requires fault (Vertretenmüssen or Verschulden), i.e. the debtor having breached his obligations intentionally or negligently (see § 280(1) second sentence in conjunction with § 276 BGB). The practical relevance of this difference in approach emanates from an application of the fault requirement under the BGB that German courts developed decades ago and that has been maintained unchanged even after the law reform through the Schuldrechtsmodernisierungsgesetz: According to this case law, a seller that has sold a good that was manufactured not by the seller himself, but by a different manufacturer is without fault (and thus not liable for damages under the BGB) if the defect of the good was caused during the manufacturing process.[45] This decidedly seller-friendly interpretation stands in stark contrast to the legal situation under the CISG, where the mere fact that the seller has not caused the non-conformity himself would clearly be insufficient to exclude his liability for damages under Article 79(1), (2) CISG[46] – an assessment that was confirmed by the BGH.[47]

A further difference relates to the buyer's duty to give notice of non-conformity, as the notice needs to be given „immediately" (unverzüglich) under § 377(1) of the German Commercial Code, while Article 39(1) CISG merely requires a notice „within reasonable time". This difference in standard arguably has influenced early German court decisions applying Article 39(1) CISG, in the sense that the courts adopted an overly strict interpretation of this provision[48] by following the spirit of their home law. Over time, this tendency, which was incompatible with the requirements of Article 7(1) CISG, was largely abolished after the BGH had adopted a more lenient standard under Article 39(1) CISG.[49]

Finally, certain differences exist with respect to the buyer's claim for specific performance, which is considered the primary remedy under the German BGB, while it

[45] Bundesgerichtshof, 21 June 1967, Docket No. VIII ZR 26/65, Neue Juristische Wochenschrift (1967), 1903; Bundesgerichtshof, 15 July 2008, Docket No. VIII ZR 211/07, Neue Juristische Wochenschrift (2008), 2837, 2840; Bundesgerichtshof, 2 April 2014, Docket No. VIII ZR 46/13, Neue Juristische Wochenschrift (2014), 2183. For the opposite opinion in German scholarly literature, see Ulrich G Schroeter, 'Untersuchungspflicht und Vertretenmüssen des Händlers bei der Lieferung sachmangelhafter Ware', Juristenzeitung (2010), 495, 497.

[46] Ulrich Magnus, in Staudinger's Kommentar zum BGB (2013), Article 79 para. 26; Ingo Saenger, in Bamberger/Roth, Kommentar zum Bürgerlichen Gesetzbuch (3rd ed., 2012), Article 79 para. 4a; Ingeborg Schwenzer, in Schlechtriem & Schwenzer Commentary on the UN Convention on the International Sale of Goods (3rd ed., 2010) Article 79 para. 29.

[47] Bundesgerichtshof, 24 March 1999, Docket No. VIII ZR 121/98, CISG-online No. 396.

[48] See the case law listed in Ingeborg Schwenzer, in Schlechtriem/Schwenzer, Kommentar zum Einheitlichen UN-Kaufrecht – CISG –, 6th ed., 2013, Article 39 para. 17 note 105.

[49] Bundesgerichtshof, 3 November 1999, Docket No. VIII ZR 287/98, CISG-online No. 475.

is subject to the exception in Article 28 CISG under the CISG. In addition, the buyer's right to demand delivery of substitute goods is not subject to special prerequisites under § 437 No. 1 in conjunction with § 439 BGB, whereas the buyer may require the delivery of substitute goods under Article 46(2) CISG only if the lack of conformity constitutes a fundamental breach of contract (Article 25 CISG). In practice, these differences are nevertheless of no particular importance, as neither requests for specific performance nor for the delivery of substitute goods occur with frequency.

**c) Status of international treaties within the German legal system**

As far as the status of international treaties within the national legal system is concerned, Germany follows a dualist approach, with the treaty having to be ratified by the Federal Parliament by way of a federal law which is usually called Vertragsgesetz (see Article 59(2) of the Basic Law of the Federal Republic of Germany). Due to this ratification and implementation procedure, treaties so implemented do not formally have precedence over statutory law, as their rank is that of the implementing Vertragsgesetz. As a Vertragsgesetz is a normal federal law, it occupies the same rank as all other statutory federal laws. The German courts, including the Federal Constitutional Court, have nevertheless traditionally attempted to respect treaty obligations independent of their formal rank by interpreting German statutory law as far as possible in accordance with binding international treaties.[50] In doing so, they have inter alia interpreted the scope of provisions of statutory laws as implicitly not being applicable to situations governed by treaties, thereby preventing a conflict between the two sets of rules.

### *3.2. The CISG and law school education in Germany*

The CISG is only rarely taught in German law schools. While a few schools offer specific CISG courses and some treat the CISG as part of their courses on commercial law, in most German law schools it does not form part of the curriculum. An important reason is that law school curricula are usually modelled on (or at least strongly influenced by) the subjects that will be tested in the First State Exam, which concludes law studies at German law schools and which is conducted by the Ministries of Justice (not the law schools themselves). As the CISG is currently not among the First State Exam subjects, any law school course dedicated to the CISG teaches a topic which is not relevant for the final exam, making it difficult to generate interest on the side of the students. (The fact that the CISG is not taught in law schools also explains the frequent lack of familiarity among German legal practitioners, who have to familiarize themselves with the CISG upon their own initiative.)

[50] Bundesverfassungsgericht, 26 March 1987, Docket Nos. 2 BvR 589/79, 2 BvR 750/81, 2 BvR 284/85, Entscheidungen des Bundesverfassungsgerichts Vol. 74, 358, 370; Schroeter, *supra* note 42, § 5 para 51.

### *3.3. German courts and legal scholarship*

The German courts are generally willing to consult and cite relevant scholarly works, and many courts look to scholarly works as their first source in gathering information about the law rather than directly consulting case law. Amongst the scholarly works which are consulted, article-by-article commentaries (on the CISG or on other applicable laws) are clearly the most important. Citations to scholarly works are generally much more frequent in court decisions rendered by higher courts (courts of appeals (Oberlandesgerichte) and notably the Federal Supreme Court (Bundesgerichtshof)), while decisions by courts of first instance rarely make references to such works.

## 4. Personal scope of CISG application

### *4.1. Application of the CISG ratione personae and ex officio*

In German courts, the CISG is applied ex officio, in accordance with the principle *iura novit curia*. It is therefore irrelevant whether the parties make reference to the CISG in their statement of claim or defence, or in their oral pleadings.

In accordance with this general approach, German courts also scrutinize the applicability of the CISG with regard to the parties to the contract ex officio, given that their places of business constitutes the basis for the CISG's application in accordance with Article 1(1) CISG. The parties' places of business are easy to determine for German courts as every statement of claim must necessarily include a designation of the parties according to § 253(2)(a) of the German Zivilprozessordnung (Code of Civil Procedure).

### *4.2. Application of the CISG by virtue of Article 1(1)(a) or (b) CISG respectively*

In German court practice, Article 1(1)(a) CISG has in the past 15 years or so been the clearly dominant path to the Convention's application. In court decisions since approximately the year 2000, the courts' treatment of the CISG's applicability is often very brief, frequently merely consisting in the mentioning of both parties home countries. In contrast, Article 1(1)(b) CISG was more often applied in the decade following the CISG's entry into force for Germany, because the number of CISG Contracting States was still smaller then and many sales contract adjudicated by German courts had been concluded before Germany became a Contracting State to the CISG[51] (see Article 100 CISG).

[51] For examples, see e.g. Oberlandesgericht Frankfurt am Main, 17 September 1991, Docket No. 5 U 164/90, CISG-online No. 28; Kammergericht Berlin, 24 January 1994, Docket No. 2 U 7418/92, CISG-online No. 130.

In the (today relatively rare) cases in which the CISG was found to apply by virtue of Article 1(1)(b) CISG, the courts usually specify this basis for their decision.[52] In contrast, in the much more common cases in which both parties have their places of business in different CISG Contracting States, German courts nowadays often do not make explicit reference to Article 1(1)(a) CISG, but merely remark in passing that the CISG applies.

The difference between Article 1(1)(a) and 1(1)(b) CISG is in almost all cases fully recognized by the courts. If prerequisites for both Article 1(1)(a) and 1(1)(b) CISG are fulfilled, the courts generally resort to Article 1(1)(a) CISG, usually without any mention of Article 1(1)(b) CISG. Only occasionally have German courts based the CISG's applicability on Article 1(1)(b) CISG in cases in which the requirements of Article 1(1)(a) CISG were also fulfilled.[53] The reason for such a recourse to Article 1(1)(b) CISG are not clear, and these (rare) decisions have been criticised in German legal writings.[54]

### *4.3. Role of choice of law clauses*

#### a) Choice of law and exclusion of the CISG (Article 6 CISG)

As already described earlier,[55] German courts have generally applied a rather strict standard when determining whether parties wanted to exclude the CISG. The same is true where the interpretation of choice of law clauses is concerned, in order to identify a sufficiently clear party intention to exclude the CISG's application in accordance with Article 6 CISG:

If the parties have chosen the law of a country that is a CISG Contracting State, German courts have almost unanimously held that such a clause does not constitute an exclusion of the CISG, because the CISG forms part of the law of each Contracting State.[56] In addition to the wording of the choice of law clause, it would therefore require further indications that the parties wanted to choose non-unified domestic sales law.[57]

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52 Bundesgerichtshof, 28 May 2014, Docket No. VIII ZR 410/12, CISG-online No. 2513 para. 11; Landgericht Potsdam, 7 April 2009, Docket No. 6 O 171/08, CISG-online No. 1979.

53 Bundesgerichtshof, 28 May 2014, Docket No. VIII ZR 410/12, CISG-online No. 2513 (sales contract between a German seller and a Belgian buyer).

54 See Ulrich G Schroeter, ‚Rückkaufvereinbarungen und „*contra proferentem*"-Regel unter dem UN-Kaufrecht' (2014) Internationales Handelsrecht 173, 174.

55 See supra at 2.4.

56 Bundesgerichtshof, 25 November 1998, Docket No. VIII ZR 259/97, CISG-online No. 353; Bundesgerichtshof, 11 May 2010, Docket No. VIII ZR 212/07, CISG-online No. 2125 para 15.

57 Bundesgerichtshof, 11 May 2010, Docket No. VIII ZR 212/07, CISG-online No. 2125 para 15.

Only exceptionally have cases appeared in which choice-of-law clauses selecting "German law" were treated as an exclusion of the CISG's application,[58] thereby ignoring the contrary case law of the German Supreme Court and of many courts on other CISG Contracting States.

Further details about the exclusion of the CISG's application in German court practice have been mentioned supra at 2.4.

**b) Direct choice of the CISG**

In German case law, it has been comparatively rare to encounter direct contractual choices of the CISG. Occasionally, such cases nevertheless do occur:

In one case, a Danish-German distribution agreement provided for the "primary" application of the CISG (supplemented by the merely "secondary" application of German law). The court of appeals interpreted this direct choice of the CISG as an (admissible) choice of law.[59]

In one German-Danish contract for the sale of a stallion, the choice-of-law clause provided that the contract was to the governed "exclusively" by the CISG.[60] However, since the contract furthermore contained an ICC arbitration clause, the more flexible standard in § 1051(1) German Code of Civil Procedure (resembling Article 28(1) UNCITRAL Model Law on International Commercial Arbitration) applied which allows parties to an arbitration to select "rules of law" to govern their dispute.

Another constellation in which explicit agreements on the CISG's application are common is the trade between Germany and the People's Republic of China.[61]

*4.4. Interpretation of "place of business" (Articles 1 and 10 CISG)*

Already under ULIS, the German Supreme Court had held that the term "place of business" – which neither ULIS nor the CISG explicitly define – refers to a "center of a party's business activities from which it participates in commercial transactions",[62] and commentators generally assume that this definition continues to apply under

[58] See Oberlandesgericht München, 2 October 2013, Docket No. 7 U 3837/12, CISG-online No. 2473. The decision has been criticised by Ulrich Magnus, 'UN-Kaufrecht – Konsolidierung und Ausbau nach innen und gleichzeitig Erodierung von außen? – Aktuelles zum CISG', ZEuP (2015), 159, 169.

[59] Oberlandesgericht Koblenz, 22 April 2010, Docket No. 2 U 352/09, CISG-online No. 2163, Internationales Handelsrecht (2010) 255.

[60] Oberlandesgericht Saarbrücken, 30 May 2011, Docket No. 4 Sch 3/10, CISG-online No. 2225.

[61] Schroeter, supra note 2, at 660.

[62] Bundesgerichtshof, 2 June 1982, Docket No. VIII ZR 43/81, Neue Juristische Wochenschrift (1982), 2730, 2731; see also Oberlandesgericht Stuttgart, 28 February 2000, Docket No. 5 U 118/99, CISG-online No. 583, Internationales Handelsrecht (2001), 65, 66.

Articles 1 and 10 CISG.[63] Formal requirements such as a registration have not been used in German case law or scholarship.

### *4.5. Application of the CISG to commercial and other contracts (Article 1(3) CISG)*

The clear wording of Article 1(3) CISG has not lead to any difficulties in German case law. Occasionally courts have nevertheless expressly confirmed it to be irrelevant for the CISG's applicability whether the parties are businessmen or not, or whether their contract is commercial or between private individuals.[64]

### *4.6. Application of the CISG to consumer contracts and Article 2(a) CISG*

Whenever the CISG's applicability is determined in accordance with Article 2(a) CISG, this may potentially lead to the CISG applying to contracts that are considered to be consumer purchase contracts under German domestic law (§ 474(1) BGB). The Supreme Court has confirmed this potential overlap between the CISG and domestic consumer law, albeit in a case that did not concern such a constellation (namely as part of the Court's reasoning about the requirements for the incorporation of standard terms into CISG contracts).[65] There reason for the overlap is that neither the general "consumer" definition in § 13 BGB nor the specific provisions on consumer purchases (§§ 474–479 BGB) require that the seller "knew nor ought to have known" that the goods were bought for private use at the conclusion of the contract, thereby differing from the regulatory approach taken in Article 2(a) CISG. As the German law on consumer purchases also applies to cases where the seller can prove that he could not have known about the purchase's intended private purpose,[66] there could potentially be conflicts between the CISG and German domestic law[67] (which insofar is furthermore based on EU directives, resulting in an indirect conflict between the CISG and EU law).

In German case law, Article 2(a) CISG has relatively rarely been decisive in the past; the vast majority of cases merely cite the provision in passing and state that it is

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63 Franco Ferrari, in Schlechtriem/Schwenzer, Kommentar, supra note 48, Art 1 para 46; Magnus, *supra* note 46, Article 1 para. 63.

64 Oberlandesgericht Schleswig, 29 October 2002, Docket No. 3 U 54/01, CISG-online No. 717, Internationales Handelsrecht (2003), 67.

65 Bundesgerichtshof, 31 October 2001, Docket No. VIII ZR 60/01, CISG-online No. 617. See further infra at 8 1.

66 Bundesgerichtshof, 30 September 2009, Docket No. VIII ZR 7/09, Neue Juristische Wochenschrift (2009), 3780, 3781: purchase of a lamp over the internet by an attorney-at-law who had given the address of her law offices as delivery address – consumer law applied.

67 Peter Schlechtriem & Ulrich G Schroeter, Internationales UN-Kaufrecht (5th ed., 2013) para 83.

inapplicable. The few cases that have applied Article 2(a) CISG concerned purchases of used cars that had been advertised on the internet; in all of those cases, the CISG was held to govern the respective sales because the (alleged) private purpose of the purchases had not been recognizable for the seller when the contract was formed.[68] The CISG was also applied to a purchase of furniture to be used in the buyer's law firm office, as this purchase had not even been conducted for personal use in the sense of Article 2(a) CISG;[69] the same was true in case of the purchase of a used car by a professional car trader.[70] Where the buyer has (presumably) purchased the car for his private use, but in signing the contract had added the abbreviation "Fa." (Firma, a term colloquially used in German to indicate a company) and the word "trader deal" (Händlergeschäft), the CISG applies to the contract, because the seller could not have known about the intended private use.[71] In contrast, the purchase of a riding horse remained outside of the CISG's scope according to Article 2(a) CISG as the horse had been bought for private use;[72] the same was held in case of a kitchen bought for installation in the buyer's private home[73] or the purchase of a used car for personal use.[74]

German national consumer sales law consists of the BGB's general provisions on sales (which, as outlined earlier,[75] have since 2002 been based on the 1999 EC Directive on Consumer Sales and are in many ways similar to the CISG), as well as certain special provisions which further improve the buying consumer's legal position (also based on the 1999 EC Directive). The latter provisions differ from the CISG.

## 5. Substantive scope of CISG application – extending the CISG beyond the sales of goods contracts

### *5.1. Notion of a "good" (Article 1 CISG)*

There is some German case law addressing this general issue, but only in respect of one aspect – the applicability of the CISG to the "sale" of software – is the position adopted by German courts worth of special mention. As this aspect has been

[68] Oberlandesgericht Stuttgart, 31 March 2008, Docket No. 6 U 220/07, CISG-online No. 1658, Internationales Handelsrecht (2008), 102: German seller, Latvian buyer; Oberlandesgericht Hamm, 2 April 2009, Docket No. 28 U 107/08, CISG-online No. 1978, Internationales Handelsrecht (2010), 59: German seller, Finnish buyer.

[69] Landgericht Bamberg, 13 April 2005, Docket No. 2 O 340/00, CISG-online No. 1402.

[70] Landgericht Köln, 16 November 1995, Docket No. 5 O 189/94, CISG-online No. 265 (aff'd in Oberlandesgericht Köln, 1 May 1996, Docket No. 22 U 4/96, CISG-online No. 254).

[71] Oberlandesgericht Hamm, 12 September 2011, Docket No. I-2 U 15/11, Internationales Handelsrecht (2012), 241, 242.

[72] Landgericht Münster, 11 September 2013, Docket No. 012 O 332/12, CISG-online No. 2554.

[73] Bundesgerichtshof, 7 March 2013, Docket No. VII ZR 162/12 para. 11.

[74] Oberlandesgericht Karlsruhe, 20 November 2014, Docket No. 9 U 234/12.

[75] See supra at 3.1. a).

comprehensively addressed by commentators,[76] it is not dealt with in detail here in order to keep the report within the applicable page limit.

### *5.2. Applicability of the CISG to contracts other than sales contracts*

In order to keep the report within the applicable page limit, this issue has similarly been left aside for the time being, given that German case addressing the issue does not depart from approaches adopted in other jurisdictions to any relevant extent.

### *5.3. Applicability of the CISG to service contracts and mixed contracts (Article 3 CISG)*

The same applies in respect of this issue as supra at 5.2.

### *5.4. Applicability of the CISG to legal issues connected with the sales of goods, but not expressly covered by CISG*

German case law has also applied the CISG to certain legal issues connected with the sale of goods, but not expressly covered by the CISG. Without attempting to provide an exhaustive list, a few of those issues deserve mentioning:

#### a) Set-off

The reliance of one party on his claim for the purpose of set-off against a claim asserted by the other party is one issue not expressly addressed in the CISG. The prevailing opinion within Germany and in other Contracting States has in the past regarded set-offs as governed by the domestic law applicable by virtue of the rules of private international law.[77] The German Supreme Court for a long time adopted the same position, but included a certain *caveat* by only ever holding that „the CISG does not apply to the set-off of claims that do not only result from a contractual relationship that is subject to the CISG (see Article 4 CISG)."[78] It thereby left open whether the CISG exceptionally could apply to set-offs between claims that both arise from one and the same CISG contract. In a decision from September 2014 involving the set-off of the German buyer's damage claim against the Hungarian seller's claim for

[76] See Ferrari, in Schlechtriem/Schwenzer, Kommentar, supra note 48, Article 1 para. 38; Ingeborg Schwenzer & Pascal Hachem, in Schlechtriem & Schwenzer Commentary, supra note 46, Article 1 para. 18.

[77] Schwenzer & Hachem, in Schlechtriem & Schwenzer Commentary, supra note 46, Article 4 paras. 27–28.

[78] Bundesgerichtshof, 23 June 2010, Docket No. VIII ZR 135/08, CISG-online No. 2129, para. 24; Bundesgerichtshof, 14 May 2014, Docket No. VIII ZR 266/13, CISG-online No. 2493 para. 18.

payment of the contract price, it finally held for the first time that the set-off between mutual payment claims which both arise from one and the same contractual relationship governed by the CISG has to be determined in accordance with the CISG's internal standards of deduction in accordance with Article 7(2) CISG.[79] The Supreme Court drew these standards from Article 58(1) second sentence, Article 81(2), Article 84(2) and Article 88(3) CISG,[80] thereby adopting a reasoning developed in German academic writing.[81] The decision is therefore also an example for the significant degree to which German courts draw inspiration from legal scholarship that was already mentioned earlier.[82]

### b) Dispute resolution clauses

German courts have often held that the formation of dispute resolution agreements are governed by the contract formation rules in Articles 14–24 CISG if the dispute resolution clause forms part of a party declaration directed at the conclusion of a CISG contract.[83] The respective case law relates to both the incorporation of forum selection clauses[84] and of arbitration clauses[85] into CISG contracts. Frequently, such cases involved standard terms including the respective dispute resolution clause, so that the principles governing the incorporation of standard terms according to Articles 8 and 14 CISG[86] were applied.

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79 Bundesgerichtshof, 24 September 2014, Docket No. VIII ZR 394/12, CISG-online No. 2545 paras. 51–62.

80 Bundesgerichtshof, 24 September 2014, Docket No. VIII ZR 394/12, CISG-online No. 2545 para. 56.

81 Namely by Magnus, *supra* note 46, Article 4 para. 47.

82 Supra at 3.3.

83 For the underlying reasoning, see Ulrich G Schroeter, in Schlechtriem & Schwenzer Commentary, supra note 46, Intro to Articles 14–24 para. 17.

84 Bundesgerichtshof, 7 January 2014, CISG-online 2477, Internationales Handelsrecht (2014) 56 at 57; Oberlandesgericht Braunschweig, 28 October 1999, CISG-online 510, Transportrecht-Internationales Handelsrecht (2000) 4–5; Oberlandesgericht Düsseldorf, 30 January 2004, CISG-online 821, Internationales Handelsrecht (2004) 108 at 111; Oberlandesgericht Köln, 24 May 2006, CISG-online 1232, Internationales Handelsrecht (2006) 147 at 148; Oberlandesgericht Köln, 25 May 2012, CISG-online 2388, Internationales Handelsrecht (2013) 68 at 71; Oberlandesgericht Oldenburg, 20 December 2007, CISG-online 1644; Landgericht Gießen, 17 December 2002, CISG-online 766, Internationales Handelsrecht (2003) 276 at 277.

85 Oberlandesgericht Düsseldorf, 22 July 2014, CISG-online 2567, Internationales Handelsrecht (2015) 18 at 21; Oberlandesgericht Frankfurt am Main, 26 June 2006, CISG-online 1385, Internationales Handelsrecht (2007) 42 at 44; Oberlandesgericht Naumburg, 13 February 2013, CISG-online 2455, Internationales Handelsrecht (2013) 158 at 160–1; Landgericht Hamburg, 19 June 1997, CISG-online 283, Recht der Internationalen Wirtschaft (1997) 873.

86 See infra at 8.1.

It is disputed whether the freedom of form principle in Article 11 CISG similarly applies to dispute resolution clauses, or not.[87] In a very recent decision, the BGH followed the latter approach and held that Article 11 CISG does not apply to forum selection clauses.[88] Unfortunately, the decision's reasoning[89] does not make entirely clear whether the BGH also rejects the application of the contract formation rules in Articles 14–24 to dispute resolution clauses – a position that, should the BGH have adopted it, certainly have warranted a more comprehensive argumentative support.

**c) Interest**

When it comes to the determination of the interest rate to be applied in cases in which Article 78 CISG (or, although less frequently, Article 84(1) CISG) entitles a party to interest, German courts almost without exception have recourse to the legal interest rate of the domestic law applicable by virtue of the rules of private international law.[90] Apart from an occasional reference to the prevailing view which the respective court follows in this respect, there is usually no elaboration about the reasons supporting this solution, nor are alternative solutions discussed.

### *5.5. Interpretation of Article 7(2) CISG*

German courts have not infrequently deducted general principles from the CISG's provisions in order to fill gaps in accordance with Article 7(2) CISG. In doing so, the courts have stressed that the interpretation and application of such principles must occur independent from domestic preconceptions.[91]

Among the general principles which were identified in German case law is the parties' duty to cooperate and inform the other party.[92] Other courts have argued that the parties' obligation to behave in accordance with good faith amounts to a general principle under the CISG.[93]

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87 For extensive references to case law and scholarly writings supporting the opposing views see Schroeter, in Schlechtriem & Schwenzer Commentary, supra note 46, Intro to Articles 14–24 para. 18.

88 Bundesgerichtshof, 25 March 2015, Docket No. VIII ZR 125/14, CISG-online No. 2588, Internationales Handelsrecht (2015), 157 para. 55.

89 Bundesgerichtshof, supra note 88, para. 56.

90 See the extensive references in Klaus Bacher, in Schlechtriem/Schwenzer, *Kommentar, supra* note 48, Article 78 para. 27.

91 Oberlandesgericht Koblenz, 24 February 2011, Docket No. 6 U 555/07, CISG-online No. 2301.

92 Bundesgerichtshof, 31 October 2001, Docket No. VIII ZR 60/01, CISG-online No. 617; Oberlandesgericht Koblenz, 24 February 2011, Docket No. 6 U 555/07, CISG-online No. 2301.

93 Oberlandesgericht Koblenz, 24 February 2011, Docket No. 6 U 555/07, CISG-online No. 2301.

In addition, it has been held that the question whether claims arising under the Convention can be forfeited (and under which conditions) has to be decided in accordance with Article 7(2) CISG, and not according to domestic law.[94] Furthermore, courts have held that it is a general principle in the sense of Article 7(2) CISG that the place of performance of payment obligations under the CISG is the creditor's place of business – a principle that has been expressly laid down in Article 57(1)(a) CISG for the obligation to pay the price, but supposedly similarly applies to the obligation to pay damages.[95]

## 6. Interpretation of the CISG – international and national influences

### *6.1. Interpretation of the CISG in an international, autonomous and uniform way (Article 7(1) CISG)*

In general, the CISG has mostly been interpreted in an international, autonomous and uniform way (Article 7(1) CISG) by German courts. However, not always has sufficient regard been had to the principles enshrined in Article 7(1) CISG; in particular during the early years after the Convention's entry into force in Germany, the yet unfamiliar provisions of the CISG were in a number of cases interpreted in accordance with the content and interpretation of counterpart provisions in the German BGB or HGB. Examples were notably the "reasonable time" requirement in Article 39(1) CISG[96] as well as the specificity standard in the same provision.[97] Over time, this "homeward trend" was fortunately reduced or completely abolished, mostly after the Federal Supreme Court had interpreted the respective provisions in accordance with Article 7(1) CISG. There nevertheless continue to be examples for a homeward trend in cases in which a new issue of interpretation appears in lower courts – in such situations, courts tend to rely on interpretations they know from similar issues under domestic law. It seems that the path to an international, autonomous and uniform interpretation will often lead through the Federal Supreme Court. While this may be viewed as less than ideal from the perspective of Article 7(1) CISG, it resembles the situation that exists for domestic provisions, with a correct and nationwide uniform construction being guaranteed through the involve-

94 Bundesgerichtshof, 23 October 2013, Docket No. VIII ZR 423/12, CISG-online No. 2474 para. 25; accord Ferrari, in Schlechtriem/Schwenzer, Kommentar, supra note 48, Article 4 para. 42; Magnus, supra note 46, Article 7 para. 43.

95 Oberlandesgericht Düsseldorf, 2 July 1993, Docket No. 17 U 73/93, CISG-online No. 74; Oberlandesgericht Braunschweig, 28 October 1999, Docket No. 2 U 27/99, CISG-online No. 510; accord Florian Mohs, in Schlechtriem & Schwenzer Commentary, supra note 46, Article 57 para. 29.

96 See supra at 3.1. b).

97 See infra at 8.2 a).

ment of the BGH. Insofar, the difficulties occurring under the CISG are in no way limited to the area of international uniform law.

In interpreting the CISG, many German courts make an effort to depart from the interpretation of the domestic legal system. As just described, such an effort is nevertheless neither always present nor always successful. The BGH has attempted to provide guidance in this regard by stressing that case law interpreting German domestic law cannot be used as precedent when interpreting the CISG, as this would violate Article 7(1) CISG.[98]

### 6.2. *References to foreign decisions and foreign legal scholarship in German court decisions*

The consultation of foreign decisions applying the CISG and foreign legal scholarship about the CISG's interpretation are commonly considered to be in accordance with Article 7(1) CISG interpretative guideline of having regard to the need to promote uniformity in the Convention's international application.[99] As explained below, German courts have in the past done both, albeit to a varying degree. By necessity, the following description is based on the explicit references to foreign decisions and foreign legal scholarship in published decisions of German courts rendered between 1991 and 2015;[100] whether additional consultation of such material has occurred in court practice that is not discernible from court decisions' text remains unknown.

#### a) Direct references to foreign case law on the CISG

Direct references to foreign court decisions on the CISG have in the past occurred on all levels of the German court hierarchy, with the exception of Amtsgerichte (petty courts of first instance with jurisdiction over cases with a value of less up to 5.000 Euro, which only very rarely deal with CISG cases). More specifically, such references can be found in seven decisions of the Federal Supreme Court,[101] ten decisions

98 Bundesgerichtshof, 2 March 2005, Docket No. VIII ZR 67/04, CISG-online No. 999, Internationales Handelsrecht (2005), 158.

99 Schwenzer & Hachem, in Schlechtriem & Schwenzer Commentary, supra note 46, Article 7 para. 10.

100 The reporter is indebted to the members of staff at his Chair at the University of Mannheim who went through the text of all published German CISG decisions in order to detect references to foreign case law or foreign legal scholarship.

101 Bundesgerichtshof, 31 October 2001, Docket No. VIII ZR 60/01, CISG-online No. 617 (citing a commentary by Magnus and his reference to a decision of the Austrian Supreme Court); Bundesgerichtshof, 30 June 2004, Docket No. VIII ZR 321/03, CISG-online No. 847, Internationales Handelsrecht (2004), 201 (citing court cases from Canada and the Netherlands as well as foreign arbitral awards); Bundesgerichtshof, 2 March 2005, Docket No. VIII ZR 67/04, CISG-online No. 999, Internationales Handelsrecht (2005), 158 (citing

of court of appeals[102] and two decisions rendered by Landgerichte.[103] With an overall number of 19 German decisions that contain references to foreign CISG case law, 3.5% of the published German cases have much such references.

At the same time, the vast majority of CISG decisions from Germany do not refer to any foreign case law. However, this is hardly surprising and should not in itself be viewed as an indication of disregard to Article 7(1) CISG: In practice, most court decisions (particularly of lower courts) hardly interpret CISG provisions, but merely apply them to the facts of the case at hand. Accordingly, references to domestic case law are similarly absent from most decisions rendered by lower German courts on non-CISG matters.

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two Austrian court cases); Bundesgerichtshof, 9 July 2008, Docket No. VIII ZR 184/07, CISG-online No. 1717 para. 19 (citing a decision of the Italian Supreme Court, although this reference was made in the context of interpreting Article 5 No. 1 Brussel I Regulation and its possible interaction with Article 31(a) CISG, so that the BGH's primary focus was on the interpretation of the Brussel I Regulation); Bundesgerichtshof, 7 November 2012, Docket No. VIII ZR 108/12, CISG-online No. 2374 para. 16 (citing a decision of the Swiss Supreme Court); Bundesgerichtshof, 24 September 2014, Docket No. VIII ZR 394/12, CISG-online No. 2545 paras. 24–28, 30–31, 42, 53–54 (citing decisions of the Austrian and the Swiss Supreme Court); Bundesgerichtshof, 25 March 2015, Docket No. VIII ZR 125/14, CISG-online No. 2588, Internationales Handelsrecht (2015), 157 para. 56 (citing decisions from Switzerland and Argentina).

[102] Oberlandesgericht Düsseldorf, 23 March 2011, Docket No. I-15 U 18/10, CISG-online No. 2218 (citing a decision of the Dutch Supreme Court); Oberlandesgericht Hamburg, 25 January 2008, Docket No. 12 U 39/00, CISG-online No. 1681, Internationales Handelsrecht (2008), 98 (citing two decisions of the Austrian Supreme Court and a French court of appeal case); Oberlandesgericht Hamm, 2 April 2009, Docket No. 28 U 107/08, CISG-online No. 1978, Internationales Handelsrecht (2010), 59 (citing a US court case); Oberlandesgericht Hamm, 30 November 2010, Docket No. 19 U 147/09, CISG-online No. 2291 (citing a decision of the Austrian Supreme Court); Oberlandesgericht Karlsruhe, 20 July 2004, Docket No. 17 U 136/03, CISG-online No. 858, Internationales Handelsrecht (2004), 246, 250 (citing an Austrian court case); Oberlandesgericht Karlsruhe, 8 February 2006, Docket No. 7 U 1001/04, CISG-online No. 1328, Internationales Handelsrecht (2006), 106, 107 (citing court cases from Switzerland and the US); Oberlandesgericht Koblenz, 24 February 2011, Docket No. 6 U 555/07, CISG-online No. 2301 (citing two decisions of the Austrian Supreme Court); Oberlandesgericht Saarbrücken, 17 January 2007, Docket No. 5 U 426/06-54, CISG-online No. 1642 (citing a decision of the Austrian Supreme Court); Oberlandesgericht Saarbrücken, 30 May 2011, Docket No. 4 Sch 3/10, CISG-online No. 2225 (citing a decision of the French Supreme Court); Oberlandesgericht Stuttgart, 31 March 2008, Docket No. 6 U 220/07, CISG-online No. 1658, Internationales Handelsrecht (2008), 102 (citing court cases from Denmark, Finland and the Netherlands).

[103] Landgericht Neubrandenburg, 3 August 2005, Docket No. 10 O 74/04, CISG-online No. 1190, Internationales Handelsrecht (2006), 26 (citing a Russian arbitral award); Landgericht Trier, 8 January 2004, Docket No. 7 HKO 134/03, CISG-online No. 910, Internationales Handelsrecht (2004), 115 (citing a court case from the US).

When investigating in more detail what references to foreign CISG case law have been made by German courts, the result is as follows: Eight among the 19 German decisions mentioned above refer to Austrian case law, four to Swiss case law, three each to CISG case law from the Netherlands and from the U.S., two to case law from France, and one case each to CISG cases from Argentina, Canada, Denmark, Finland, Italy and Russia. That references to Austrian cases are the most common is in accordance with empirical evidence about general (i.e. not necessarily CISG-related) German case law, where Austrian case law was similarly found to be most frequently referred to by German courts (and vice versa).[104]

It is furthermore interesting to note that German decisions usually contain no more than four references to foreign cases, while some Italian decisions on the CISG contain up to 40 of such references.

In addition, references to case law from other CISG Contracting States have occasionally occurred in arbitral awards rendered by arbitral tribunals with a German seat.[105] As the number of published arbitral awards is generally very small, these examples probably do not allow any general conclusions to be drawn about the use of foreign persuasive precedents in arbitration.

### b) 'Indirect' references to foreign case law on the CISG

In addition, some court decisions contain 'indirect' citations to foreign cases, in the sense that such decisions cite secondary sources like commentaries,[106] law review articles[107] or the UNCITRAL case digest[108] which in turn list the respective foreign case law. Usually, these indirect references are also less specific it describing which

[104] See Martin Gelter & Mathias Siems, 'Networks, Dialogue or One-Way Traffic? An Empirical Analysis of Cross-Citations Between Ten of Europe's Highest Courts', 8 Utrecht Law Review (2012) 88 at 95–96.

[105] See Arbitral Tribunal of the Hamburg Chamber of Commerce, Final award of 21 June 1996, CISG-online No. 465 (citing a decision by the French court of appeal Grenoble); Arbitral tribunal of the Hamburg Friendly Arbitration, 29 December 1998, CISG-online No. 638, Internationales Handelsrecht (2001), 35 (citing the same decision by the French court of appeal Grenoble).

[106] Bundesgerichtshof, 7 November 2012, Docket No. VIII ZR 108/12, CISG-online No. 2374 para. 22; Bundesgerichtshof, 16 July 2013, Docket No. VIII ZR 384/12, CISG-online No. 2466 para. 14; Bundesgerichtshof, 25 March 2015, Docket No. VIII ZR 125/14, CISG-online No. 2588, Internationales Handelsrecht (2015), 157 para. 55 (citing commentary contribution by a Spanish author „especially regarding U.S. and Canadian case law supporting this view"); Landgericht Neubrandenburg, 3 August 2005, Docket No. 10 O 74/04, CISG-online No. 1190, Internationales Handelsrecht (2006), 26.

[107] Bundesgerichtshof, 7 November 2012, Docket No. VIII ZR 108/12, CISG-online No. 2374 para. 22.

[108] Bundesgerichtshof, 7 November 2012, Docket No. VIII ZR 108/12, CISG-online No. 2374 para. 22.

court decisions they refer to, by merely mentioning e.g. "case law from [Contracting State X]".

**c) References to foreign legal scholarship**

References to foreign (i.e. non-German) authors occasionally occur in German court decisions,[109] although relatively infrequently. Note that a more frequent constellation was not taken into account in this context, namely references to Austrian or Swiss authors writing in German-language article-by-article commentaries on the CISG: In the latter cases, the nationality of the respective author is arguably a mere coincidence and should not be considered to be a sign of the court consulting 'foreign' legal scholarship.

### *6.3. "Good faith in international trade" (Article 7(1) CISG)*

German courts have made no attempt to define in the abstract what "good faith in international trade" under the CISG means. While courts have occasionally held that good faith applies in general under the CISG,[110] thereby indicating that the good faith principle may also be applied to the parties and their behaviour and not merely to the interpretation of the Convention's provisions,[111] recourse to the principle has been relatively rare in German courts. The maybe most prominent example is a leading decision by the BGH on the requirements for the incorporation of standard terms into CISG contract,[112] in which the Federal Supreme Court also referred to good faith when demanding that the offeror should make the standard terms' text available to the other party.[113]

With regard to the question whether there is a difference between domestic good faith and good faith in international trade, a court of appeal has stressed that "good

[109] Bundesgerichtshof, 24 March 1999, Docket No. VIII ZR 121/98, CISG-online No. 396, NJW (1999), 2440 (citing the views of scholars from England, France, Switzerland and the US); Bundesgerichtshof, 26 September 2012, Docket No. VIII ZR 100/11, CISG-online No. 2348 para. 34 (citing a Swiss commentary as well as a commentary contribution by a Turkish author); Bundesgerichtshof, 7 November 2012, Docket No. VIII ZR 108/12, CISG-online No. 2374 para. 22 (citing a commentary contribution by a Spanish author); Bundesgerichtshof, 24 September 2014, Docket No. VIII ZR 394/12, CISG-online No. 2545 para. 56 (citing a commentary contribution by a Serbian author).

[110] OLG Brandenburg, 18 November 2008, CISG-online No. 1734: 'because of Article 7(1) the principle of Treu und Glauben also applies under the CISG'.

[111] The question is disputed; see Schlechtriem & Schroeter, supra note 67, paras. 101–102.

[112] See in more detail infra at 8.1.

[113] Bundesgerichtshof, 31 October 2001, Docket No. VIII ZR 60/01, CISG-online No. 617. See also the criticism in Schroeter, in Schlechtriem & Schwenzer Commentary, supra note 46, Article 14 para. 42.

faith" under the CISG has to be interpreted independently from domestic preconceptions.[114] Nevertheless, the outcome of applying the rather abstract principle to practical cases often leads to results that are very similar to those reached under domestic German law.

### *6.4. General principles of the CISG*

Note that the issue of general principles underlying the CISG (Article 7(2) CISG) has been addressed supra at 5.2.

6.5. Suggestions for the improvement of the uniformity of interpretation and the further harmonization of contract law

In order to improve the uniformity of interpretation in the region, a key matter seems to be the need to provide easy accessible (i.e. free of charge over the internet) translations of the case law rendered by the local courts on the CISG. The translations should be into a language widely understood internationally, as notably English.

In further harmonizing and/or unifying contract law in the region and internationally, a key issue is the relationship of such projects to the CISG. It should be made certain by way of explicit clauses in any new legal texts that the CISG's application remains unaffected, preferably by granting prevalence to the CISG in cases in which both texts instruments conflict.

## 7. Reservations/Declarations (Articles 92-96 CISG)

The Federal Republic of Germany has never declared any of the reservations authorized by Articles 92–96 CISG.

However, Germany made an interpretative declaration[115] pertaining to Article 95 CISG when ratifying the CISG, in which it expressed the view that parties to the CISG that have made a declaration under Article 95 CISG are not to be considered "Contracting States" within the meaning of Article 1(1)(b) CISG. Accordingly, Germany assumed no obligation to apply Article 1(1)(b) CISG when the rules of private international law lead to the application of the law of an Article 95 CISG reserving State.

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[114] Oberlandesgericht Koblenz, 24 February 2011, Docket No. 6 U 555/07, CISG-online No. 2301. But see Oberlandesgericht Oldenburg, 5 December 2000, CISG-online No. 618, where the court in an obiter dictum referred to German domestic law standards of good faith.

[115] Ferrari, in Schlechtriem/Schwenzer, Kommentar, supra note 48, Article 1 para. 79; Rolf Herber and Beate Czerwenka, Internationales Kaufrecht, 1991, Article 1 para. 19; Magnus, supra note 46, Article 1 para. 112.

The admissibility of this interpretative declaration is doubtful.[116] In practice, it has remained entirely without effect, as not a single case has been published in which a German court has relied on it. Only one early case has become known in which the conditions for its application – the rules of private international law applicable in Germany leading to the application of the law of an Article 95 CISG reserving State, without the CISG already being applicable according to Article 1(1)(a) CISG – were fulfilled. The Court of Appeals Düsseldorf, however, overlooked the interpretative declaration in this case,[117] a mishap for which the court has been criticized in legal writings.[118]

Against this background, it must seem highly doubtful whether Germany's interpretative declaration will ever be applied in practice.

## 8. Challenges in the application of specific CISG provisions

### *8.1. Incorporation of standard terms into CISG contracts and the "Making Available" test*

A matter that has very often appeared in German courts and continues to appear are the requirements for an inclusion of one party's standard terms into a CISG contract, i.e. the inclusion of contract terms by reference. The related discussion primarily concerns the interpretation of Articles 8 and 14 CISG. In the arguably leading decision rendered by the Federal Supreme Court in 2001 in the „machinery case",[119] the BGH held that the CISG 'requires the user of standard terms and conditions to send their text or make it otherwise available' to the offeree, if the offeree has not and could not have been aware of the standard terms' text before. Courts in a number of other CISG Contracting States – the Netherlands,[120] Italy,[121] Switzerland,[122] and the

[116] See Ulrich G Schroeter, 'Backbone or Backyard of the Convention? The CISG's Final Provisions', in Camilla B Andersen & Ulrich G Schroeter (Eds.), Sharing International Commercial Law Across National Boundaries: Festschrift for Albert H. Kritzer on Occasion of his Eightieth Birthday (2008) 427 at 455–456.

[117] Oberlandesgericht Düsseldorf, 2 July 1993, Docket No. 17 U 73/93, CISG-online No. 74.

[118] Peter Schlechtriem, Case note, Entscheidungen zum Wirtschaftsrecht (EWiR) Article 1 CISG 1/93, 1075.

[119] Bundesgerichtshof, 31 October 2001, Docket No. VIII ZR 60/01, CISG-online No. 617.

[120] Gerechtshof Den Haag, 22 April 2014, CISG-online 2515, Docket No. 200.127.516-01: 'The Court thus follows the reasoning of the above-mentioned German Bundesgerichtshof decision of 31 October 2001 …'; Rechtbank Gelderland, 30 July 2014, CISG-online No. 2541 para 2.14; Rechtbank Rotterdam, 25 February 2009, CISG-online No. 1812; Rechtbank Utrecht, 21 January 2009, CISG-online No. 1814.

[121] Tribunale di Rovereto, 21 November 2007, CISG-online No. 1590; Tribunale di Rovereto, 24 August 2006, CISG-online No. 1374.

[122] Obergericht Bern, 19 May 2008, CISG-online No. 1738.

U.S.[123] – have followed this approach, usually explicitly referring to the BGH's decision in accordance with Article 7(1) CISG. Nevertheless, the matter continues to be disputed in legal scholarship, while German court practice[124] follows the decision of the BGH.

German courts have also ruled on a plethora of other issues in connection with the incorporation of standard terms into CISG contracts that cannot be listed here in detail.[125] In the "milk powder case",[126] the BGH furthermore rendered another leading decision on the disputed issue of the "battle of the forms" under the CISG, in which he showed a certain preference for the "knock out rule".

### *8.2. Buyer's notice of non-conformity (Article 39(1) CISG)*

Article 39(1) CISG, which – as mentioned earlier – ranks among the CISG provisions most frequently applied in German court practice, has posed two areas of difficulty for German courts.

#### a) Necessary specificity of notice

The first is the necessary specificity of the notice of non-conformity to be given by the buyer to the seller, i.e. the degree of detail with which the defect(s) of the delivered goods need to be described. In particular in early years after 1991, German courts applied this requirement very strictly.[127] The reason for this approach can probably be traced to a translation issue:

While the authentic English text of Article 39(1) CISG speaks of the buyer's need to "give notice to the seller specifying the nature of the lack of conformity", the official (but non-authentic) German translation does not merely require him to specify the lack of conformity's nature, but demands an "exact" specification ("genau bezeichnet"). It can therefore be read as imposing a stricter standard than the authentic text version of Article 39(1) CISG – an unfortunate result of a less-than-perfect translation that has been noticed in legal writings,[128] but is likely to remain unnoticed in court practice where the judges will usually consult the German translation only.

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123 Roser Technologies, Inc v Carl Schreiber GmbH, US District Court (WD Pa), 10 September 2013, CISG-online No. 2490.

124 See the German case law listed in Schroeter, in Schlechtriem & Schwenzer Commentary, supra note 46, Article 14 para. 47.

125 See Schroeter, in Schlechtriem & Schwenzer Commentary, supra note 46, Article 14 paras. 32–76.

126 Bundesgerichtshof, 9 January 2002, Docket No. VIII ZR 304/00, CISG-online No. 651.

127 See the early German cases listed in Schwenzer, in Schlechtriem/Schwenzer, Kommentar, supra note 48, Article 39 para. 6 note 33.

128 Schlechtriem & Schroeter, *supra* note 67, para. 416; Schwenzer, in Schlechtriem/Schwenzer, Kommentar, supra note 48, Article 39 para. 6.

As a result of a BGH decision from 1999,[129] a more lenient (and appropriate) standard has since become more common in German cases, although relatively strict constructions of the specificity needed still occur.

**b) "Reasonable time" for giving notice and the "Noble Month"**

The interpretation of the time-frame imposed by Article 39(1) CISG on the buyer – to "give notice to the seller [...] within a reasonable time after he has discovered it or ought to have discovered it" – created some difficulties for German courts in the early years after the CISG's entry into force in Germany. As already mentioned earlier,[130] many German decisions from that time interpreted the „reasonable time" requirement very strictly in accordance with a similar (but different) provision in the German Commercial Code – a tendency that has since been overcome.

*8.3. Attorneys' fees as recoverable damages under Article 74 CISG*

It is a much disputed question in international CISG case law and scholarly writing whether or not attorneys' fees constitute damages that are recoverable under Article 74 CISG. A U.S. Federal court of appeals held in the famous case Zapata Hermanos Sucesores v Hearthside Baking Company[131] that attorneys' fees are not recoverable under the Convention, and a leading German article-by-article commentary on the CISG has essentially adopted the same position.[132] In spite of this situation and the visibly disputed interpretation of Article 74 CISG, the recovery of attorneys' fees has been routinely granted by (lower) German courts, without apparent awareness of the controversy surrounding the question.[133] Much is to be said for the assumption that this approach follows the example of German domestic law and is therefore incompatible with Article 7(1) CISG.

129 Bundesgerichtshof, 3 November 1999, Docket No. VIII ZR 287/98, CISG-online No. 475.

130 See supra at 3.1. b).

131 Zapata Hermanos Sucesores, S A v Hearthside Baking Company, Inc, 19 November 2002, CISG-online No. 684, 313 F3d 385 (7th Cir 2002).

132 Schwenzer, in Schlechtriem/Schwenzer, Kommentar, supra note 48, Article 79 paras. 29–30.

133 Oberlandesgericht München, 5 March 2008, Docket No. 7 U 4969/06, CISG-online No. 1686; Amtsgericht Augsburg, 29 January 1996, Docket No. 11 C 4004/95, CISG-online No. 172; for extensive further references to German case law see Schwenzer, in Schlechtriem/Schwenzer, Kommentar, supra note 48, Article 79 para. 30 note 89. For the same opinion see Burghard Piltz, 'Rechtsverfolgungskosten als ersatzfähiger Schaden', in Festschrift für Ingeborg Schwenzer zum 60. Geburtstag (2011) 1387 at 1398.

## Bibliography

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**A textbook on the CISG written in German**

Schlechtriem, P., Schroeter, U. G., Internationales UN-Kaufrecht (5th edn, Mohr Siebeck 2013)

Specific CISG topics are discussed in articles published in various German law journals and reviews, amongst which the law journal Internationales Handelsrecht (IHR) has a particular focus on international sales law topics. In addition, two well-known German CISG expert publish biannual articles that provide a very helpful overview of the developments in CISG case law: Ulrich Magnus has published his overview articles (under changing titles) in the law review Zeitschrift für Europäisches Privatrecht (ZEuP) since 1993, most recently in 2015,[134] while Burghard Piltz invariably uses the title „Neue Entwicklungen im UN-Kaufrecht" for the overviews he has been publishing in the law journal Neue Juristische Wochenschrift (NJW) since 1994, most recently in 2013.[135]

[134] See above note 58.

[135] Burghard Piltz, ‚Neue Entwicklungen im UN-Kaufrecht', Neue Juristische Wochenschrift (2013), 2567.